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Point I

There is no dispute that when the 1987 Separation Agreement was drafted, executed by the parties and incorporated into the original Decree of Legal Separation that it was the intent of both Appellant Paulette Ochoa (hereinafter "Wife") and Respondent Marco Ochoa (hereinafter "Husband") that the relevant provisions in the Decree were intended to meant to qualify as a QDRO. Not only did the Decree provide the specifics required by ERISA for the future distribution of Husband's DaimlerChrysler pension, profit-sharing and savings plans, Section 10.18 of the Agreement specifically stated that "it is the intention of the Wife and Husband that the foregoing provisions shall qualify as a Qualified Domestic Relations Order…" (L.F. 30).

There is also no dispute that in 1987 a copy of the Decree of Legal Separation containing the parties' agreement was submitted to DaimlerChrysler.

And, finally, there is no real dispute that when Wife asked the trial court in June 2000 to approve the now modified – but certainly not new - DaimlerChrysler QDRO she had prepared to meet the requirements of the plan administrator that she was not asking the court to create a QDRO out of whole cloth or to approve a QDRO for the first time but merely – as specifically provided for by Section 452.330(5) R.S.Mo. - to "revise or conform [the original] terms so as to effectuate the expressed intent of the parties and the original order. Wife sought only to have the Court invoke the authority given it under Section 452.330(5) to modify its

original 1987 qualified domestic relations orders affecting pension, profit sharing and stock bonus plans *to revise or conform its terms so as to effectuate the expressed intent of the order*." (emphasis added).

Husband does not dispute the holding of the Court in *Principal Mut. Life Insurance Co. v. Karney*, 5 F. Supp. 2d 720 (E.D. Mo. 1998) cited in Wife's brief. In *Karney*, the court found "meritless" the argument that Section 516.350 R.S.Mo should apply in a case such as the instant one. First the court noted that it made little sense to require divorced (or legally separated) persons "to go to court no more than every ten (10) years to "revive" their divorce decree; otherwise their divorce decree would be nullified." *Id*. at 726. Second, according to the court, the "presumption of payment" in Section 516.350 R.S.Mo. was meant to apply in situations where "at the time of the entry of the decree a judgment of money damages or fees was clearly denoted; i.e. the interested party received a judgment entitling him or her to a sum of money ascertainable as of the date of the original entry of the judgment." *Id.* Obviously that is not the situation in the case now before this Court or, indeed in any case where pension and other retirement funds might not be distributable perhaps for decades after the entry of the Court's original domestic relations Order.

Husband argues that a recent case, *Wells v. Wells*, 998 S.W.2d 165 (Mo. App. W.D. 1999), in which the court modified a QDRO so as to effectuate the expressed intent of the court's order concerning distribution of property is not analogous to the instant case. He seeks to differentiate between them based on the

fact that in *Wells* the court was not asked to "establish" a QDRO (as he argues Wife does), but simply to amend it pursuant to Section 452.330.5 R.S.Mo.

There are two errors in Husband's analysis. First, nowhere in *Wells* does the court ever make a distinction between "establishing" and "maintaining" a QDRO. To do either is specifically with the Court's authority under the statute and there are no time limits or restrictions on either mentioned in the statute. *Wells v. Wells*, 998 S.W.2d 165, 168 (Mo. App. W.D. 1999). The *Wells* court notes "[Section 452.330.5, R.S.Mo.] grants the circuit court power to either modify a QDRO *'to establish'* or to maintain the QDRO's status as 'qualified' under a particular plan *or alternatively to conform its terms* to effectuate the [intent of the court's order and the parties' intent regarding distribution of property]."(emphasis added) *Id*. at 168. That is exactly what Wife asked the Circuit Court below to do.

The second flaw in Husband's argument is that despite the unambiguous language of the statute, Husband would have this court interpret *Wells* as meaning somehow that Section 452.330.5 R.S.Mo. requires that a QDRO must already *be* established before a court has jurisdiction to establish it. This tortured reading of the plain language of the statute simply makes no sense. And, as one of the cases cited by Husband states, "The Supreme Court is not authorized to supply exceptions to an unambiguous statute. Wormington (Woolsey) v. City of Monet, 218 S.W.2d 586 (Mo. 1949).

Both Husband and Wife admit that in 1987 their expressed intent was that the relevant language incorporated into the Decree of Legal Separation was to

constitute a QDRO. That affirmation is an integral part of their Agreement. (L.F. 30). Under Section 452.330.5. R.S.Mo. to modify a QDRO, a party must establish *only* that the circuit court would be modifying the existing provisions in the decree to establish, maintain the QDRO's status as 'qualified' under the particular DaimlerChrysler plans at issue here. Wife did that with her submission to the trial court of modified QDRO's which DaimlerChrysler had found to satisfy the requirements of a QDRO. (L.F. 59). .

Nor does *Starrett v. Starrett*, 24 S.W.3d 211 (Mo. App. E.D. 2000) compel a different result than the logic of *Wells*. Unlike in the instant case, there was nothing in the original *Starrett* decree evidencing intent by the trial court to effectuate the distribution of marital property through the mechanism of a QDRO. In *Starrett* there was not (as was the situation in the present case) entire detailed verbiage of a QDRO spelled out in a Court's Order (L.F. 24-31) or an affirmation by the parties in the Separation Agreement of their intent that the language incorporated into the decree was to serve as a QDRO. (L.F. 30). *Starrett* never even mentions Section 452. 330.5 R.S.Mo.

Wife is entitled to have the Court modify that QDRO to meet the requirements of the Plan Administrator and to conform its terms to effectuate the intent of the court's original order regarding distribution of property without regard to the period of time since the entry of the decree of legal separation.

Point II

A review of the timing of the various procedural steps in this case demonstrates that the argument that Wife now raises as it pertains to the effect of the 2001 amendment to Section 516.350 R.S.Mo. was raised at the first possible opportunity.

Section 516.350, R.S.Mo., as amended in 2001 should be applied retroactively. Some arguments for why this is so are described in Wife's Substitute Brief and will not be repeated here. Husband's brief also raises several other points that lead to the same conclusion. It is appropriate therefore that they be discussed in greater detail.

Husband misstates the law when he says that Section 516.350 R.S.Mo. is a statement of a statute of limitations simply because of its placement in Chapter 516 R.S.Mo. "The principal function of this section providing that every judgment shall be presumed to be paid and satisfied after expiration of ten years from the date of original rendition thereof, etc. is a statement of a **rule of evidence**, although it is found among statutes relating to limitations". (emphasis added). *Ballard v. Standard Printing Co*., 202 S.W.2d 780, (Mo. Supp. 1947).

To support his argument against retrospective application of the law Husband relies heavily on three cases, *Helfenbein v. Helfenbein*, 871 S.W.2d 131 (Mo. App. E.D. 1994), *Sparks v. Trantham*, 814 S.W.2d 621 (Mo. App. S.D. 1991) and *Walls v. Walls*, 673 S.W. 2d 450 (Mo. App. E.D. 1984). However, a close review of each of these three cases demonstrates that each time the statute

has been amended in the past that the courts *have* applied the amendment retroactively.

Prior to 1982 even though they provided for periodic payments for support of minor children judgments in divorce actions were subject to the same incidents as money judgments in actions at law and, pursuant to the statute then in effect were presumed to be paid after the expiration of ten years from the date of the original rendition thereof. Section 516.350 R.S.Mo. 1969, *Lanning v. Lanning*, 574 S.W.2d 460, 461 (Mo. App. 1978). But after the General Assembly amended the language of Section 516.350 in 1982 the result was very different.

The 1982 amendment of Section 516.350 took the form of a reenactment of the existing version as subsection 1 with the following language added: "except for any judgment, order, or decree awarding child support or maintenance *which mandates the making of payments over a period of time*." The cases which have been examined the issue of whether this language should be applied retroactively have all agreed that it should be absent a previous adjudication that a judgment has lapsed (see *Walls v. Walls*). In *Sparks v. Tranthan*, 814 S.W.2d 621 (Mo.App. S.D. 1991) the court specifically ruled that the amendment to Section 516.350 as it applied these kinds of payments (child support and maintenance) was to be retroactively applied. Id. at 627.

In *Trantham* the court described the specific issue it was being asked to determine by it as: “Whether the August 31, 1982, amendment to Section 516.350 operates retroactively to the period prior to August 31, 1982.” The answer of the

court was quite simply, yes. *Sparks v. Trantham*, 814 S.W.2d 621, 622 (Mo.App. S.D. 1991).

Beginning with *Trantham*, the courts specifically *rejected* the argument that the 1982 amendment to Section 516.350 did not apply retroactively. Therefore this Court should reject the argument being made now by Husband and apply the 2001 amendment retroactively. Monies earned through Husband's participation in pension, savings and profit plans which become the property of Wife after a decree of legal separation certainly share with child support and maintenance the characteristics of payments received over a period of time or in the future. The General Assembly obviously believes this to be so based on how it amended the statute in 2000 by simply adding into the existing sentence the language relating to pension, savings and profit plans.

Quoting liberally from Judge Bardgett's opinion in *In re Marriage of Holt*, 635 S.W. 2d 335, 336 (Mo. banc 1982) the *Trantham* court noted that "what [those earlier] cases [referring to pre-1982 cases in which some appellate courts had held that the statutory period referred to in Section 516.350 began to run when the order for installment payments was entered], failed to recognize is that decretal installment payments and sum certain judgments, when originally entered, are categorically different. Because of these differences they are incapable of being treated as the same and are not analogous. A periodic child support judgment looks to the future and "is not at that time (when entered) a judgment of a sum then due and owing as are most other awards of money." (internal citations

omitted) *Id*. at 626. Neither, of course, are awards of pension, savings and profit sharing plans.

In *Trantham* the father had been divorced since 1970 and had made only sporadic child support payments since. He argued that the 1982 amendments to Section 516.350 did not apply retroactively to periodic payments due prior to August 31, 1982. He relied on the same case Husband herein does, *Walls v. Walls*, 673 S.W.2d 450 (Mo.App.1984). But the Court unequivocally rejected his analysis. In *Walls* there had been a prior adjudication that the judgment had lapsed. Wife had already had a motion for execution denied by the Circuit Court and had not appealed it. In *Trantham* and in the case now before this court, there has never been an *adjudication* that the judgment had lapsed. And therefore it was correct, according to the court that it retroactively apply the 1982 amendments excluding unpaid periodic child support payments from the ten-year bar of Section 516.350 R.S.Mo.

Ultimately *Trantham* concluded that "Since *Holt*, (which was decided by this Court's predecessor in 1982), Missouri courts have consistently held that periodic child support judgments that have not been adjudicated to have lapsed are not "presumed paid" within the meaning of the last sentence of Section 516.350.2. *Holt* is a definitive statement of Missouri law ... and has been consistently followed by the courts of this state". *Sparks v. Trantham*, 814 S.W.2d 621, 627 (Mo. App. 1991).

There is no difference between the 1982 amendment that excluded periodic child support payments from the presumption of payment under Section 516.350 and the 2001 amendment expanding Section 516.350 so that it now excludes orders or decrees dividing pension, retirement, life insurance or other employee benefits from the ten year bar. So long as there has been no final adjudicated lapse of the original judgment, retroactive application of the 2001 amendment to Section 516.350 should be enforced.

In *Helfenbein v. Helfenbein* 871 S.W.2d 131 (Mo. App. E.D. 1994), another of the cases cited by Husband, the court said again that where there has been no adjudication of lapse wife's efforts to recover were not untimely respecting periodic payments and the amendment should be applied retroactively. *Id*.

The issue then is whether there has been a final adjudication of lapse of the judgment. In *Walls v. Walls*, 673 S.W. 2d 450 (Mo. App. E.D. 1984) Husband and Wife were divorced in 1969. In 1983 the circuit court denied her *second* motion for execution and garnishment. The reason the court denied the motion was because there had been a previous adjudication in her first motion that her original judgment had lapsed and that previous adjudication had been affirmed on appeal.

It is interesting to note though that even in *Walls*, where Wife was not allowed to go back beyond the date of the 1982 amendment that in 1984 she *was* allowed to begin new collection efforts – still based on the original 1969 decree – once the amendment was passed. The court stated, "It is a basic principle that statutes of limitation do not extinguish a cause of action but merely bar its remedy.

Since statutes of limitations are legislatively imposed they may be legislatively changed. The new statute of limitations, Section 516.350 R.S.Mo. 1982 excluded from the ten year bar 'any judgment … awarding maintenance which mandates the making of payments over a period of time…" We accordingly hold that plaintiff-wife's maintenance judgment was then renewed by the cited statute. Her plea for alimony should therefore have been granted for all sums falling due after August 31, 1982". *Id* at 451.

That is certainly not the posture of the facts or the law in the instant case. There has never been a final adjudication that Wife's original judgment has lapsed.

In all three cases, *Helfenbein*, *Trantham* and *Walls* the issue was whether after the 1982 amendment to Section 516.350 payments which were not payable until sometime in the future which had not been adjudicated to have lapsed were presumed to have been paid and whether the 1982 amendment should be applied retroactively. In all three cases cited by Husband the answer--- unanimously--- was that it should be.

As of August 2001 pensions, retirement, life insurance or other employee benefits which mandate the making of payments over a period of time or payments in the future are excluded from Section 516.350 now just as child support and maintenance were excluded in 1982. Section 516.350 as amended should be applied retroactively now with regard to these new exclusions as it was with those enacted in 1982.

Waiver Of The Defense of Statute of Limitations

There is also an issue as to whether Husband waived the affirmative defense of the statute of limitations.

The statute of limitations is an affirmative defense and it may be waived if there is a clear, unequivocal and decisive act of the party showing such purpose. *Wilkinson v. Bennett Construction Co.*, 442 S.W.2d 166, 170 (Mo.App.1969). The acts or representations alleged to constitute estoppel against the pleading of the time bar must have occurred prior to the expiration of the limitation period and not after the right of action had been barred by the running of the statute. 889 S.W.2d 838, *Forry v. Department of Natural Resources*, (Mo.App. W.D. 1994)

To make out a case of implied waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on Husband's part. In 34 Am.Jur.Sect. 412 it is written that: 'The matter alleged to constitute estoppel must have occurred prior to the expiration of the limitation period and not after the right of action had been barred by the running of the statute.

In the instant case, the language of the Decree and Separation Agreement signed by Husband contains such a "clear, unequivocal and decisive act of the party showing such purpose." Husband and Wife agreed that "[I]t is the intention of the Husband and Wife that the foregoing provisions shall qualify as a QDRO and whenever the provisions herein under are inconsistent with the definition of a QDRO as may be contained, from time to time, in the Internal Revenue Code of

1954, as amended, and/or ERISA, as may or may not be amended, this agreement shall be amended *from time to time as may be necessary* to comply with the requirements for a QDRO. Both parties shall enter into an agreed order of court as may be reasonably required to amend this article, and/or the Judgment for Legal Separation to so comply.*" (emphasis added)* (L.F. 30-31).

Husband has waived his right to raise the affirmative defense by his agreement to cooperate in amending the agreement from "time to time" as may be necessary to ensure that it complies with the requirements for a QDRO.

PREEMPTION

Even if one assumes *arguendo* that Section 516.350 R.S.Mo. is meant to apply to the right to establish a QDRO, such is prohibited under the Employment Retirement Income Security Act (ERISA). By incorporating within its decree language it intended to be a QDRO, the trial court made a determination that Husband's pension, profit sharing and savings plans should be administered in accordance with ERISA. ERISA shall supersede any and all State laws insofar as they …relate to any employee benefit plan." 29 U.S.C. 1144(a).

ERISA is designed to promote the interests of employees and their beneficiaries in employee benefit plans. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L.Ed. 2d 490 (1983) the United States Supreme Court said a state statute "relates to" ERISA governed employee benefit programs "if it has a connection with or reference to such a plan." The Court went on to say that state law "may relate to" a benefit plan and consequently be preempted even if

the law is not specifically designed to affect such plans, or the effect is only indirect" and includes preemption of laws that are consistent with ERISA's policies and substantive requirements." *Id.*

"ERISA's preemption clause does not have the power to transmute into a federal question every issue that brushes against the periphery of an ERISA plan." *Emard v. Hughes Aircraft* 902 (1999). The test, said the Court, is whether the State law "refers to" or has a "connection with" such a plan. *Id*. "Under the first part of this inquiry, "reference to" an ERISA plan means that the sate law must act 'immediately and exclusively' upon the ERISA plans, or alternatively, the existence of ERISA plans which are 'essential to the law's operation." *Id*.

Under the second part of this inquiry, there is certainly a "connection" between Section 516.350 R.S.Mo. and ERISA. The logical extension of Husband's argument is that if the parties involved in domestic relations cases whose resolution included a QDRO do not go to court no more than every ten (10) years to revive their decree then their decree would be nullified. *Principal Mut. Life Insurance Co. v. Karney*, 5 F. Supp. 2d 720, 726 (E.D. Mo. 1998). As a direct result, the Plan Administrator, upon notification that a participant has reached the age of retirement will have to independently investigate the age of the Domestic Relations Order and whether there has been a valid revival of any order over ten years old. Considering the number of domestic relations orders in existence now that are or will be more than ten (10) years old by the time employee/participants are able to receive benefits there will certainly be an increase in the complexity

(and therefore the cost) of administering the plans. The potential for a state to put in place such a burden on ERISA plan administrators is why a state law which impedes the function of ERISA regulation must give way to the comprehensive federal scheme designed by Congress. *Emard v. Hughes Aircraft Co.* 153 F. 3d 949 (9th Cir. 1998), *cert. denied*, 525 U.S. 1122, 119 S.Ct. 903, 142 L.Ed.

CONCLUSION

For all the foregoing reasons, Appellant Paulette Ochoa respectfully requests this Court reverse the trial court's Order denying the modification of the qualified domestic relations order made a part of and incorporated into the Court's original Decree of Legal Separation for the purpose of establishing or maintaining the order as a qualified domestic relations order so as to effectuate the expressed intent of the parties and the original Order.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

In Re the Marriage of:	)	
	)	
PAULETTE M. OCHOA,	)	
	)	
Petitioner/Appellant,	)	Supreme Court No. SC83966
	)	Circuit Court No. 550220
vs.	)	Appeal No. ED 78368
	)	
MARCO A. OCHOA,	)	
	)	Court of Appeals, Eastern Dist.
Respondent/Respondent.	)	Circuit Court for St. Louis County

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the above and foregoing Appellant's Reply Brief were mailed postage prepaid this 20th day of December 2001 to: Mr. Lawrence B. Wittels, 7701 Forsyth, Suite 950, Clayton, MO 63105.

_____

David G. Kullman, Attorney for Appellant

IN THE SUPREME COURT OF MISSOURI

In Re the Marriage of:	)	
	)	
PAULETTE M. OCHOA,	)	
	)	
Petitioner/Appellant,	)	Supreme Court No. SC83966
	)	Circuit Court No. 550220
vs.	)	Appeal No. ED 78368
	)	
MARCO A. OCHOA,	)	
	)	Court of Appeals, Eastern Dist.
Respondent/Respondent.	)	Circuit Court for St. Louis County

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

COMES NOW David Kullman, Counsel for Petitioner-Appellant and pursuant to Rule 84.06(c) states to the Court as follows:

1. Appellant's reply brief includes the information required by Rule 55.03.
2. Appellant's reply brief complies with the limitations contained in rule 84.06(b).
3. The number of words in the brief, exclusive of the cover, the certificate of service, this certificate required by Rule 84.06(c) and the signature block is 3815.
4. A floppy disk containing Appellant's Substitute Reply Brief is also being filed. Counsel certifies that it has been scanned for viruses and is virus-free.

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